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Recent Decisions

Various Editors

RECENT DECISIONS

ADOPTION—INTERESTED PARTIES—INTERVENTION OF A CHARITABLE INSTITUTION.

Cooper v. Hinrichs (Ill. 1957).

The mother of twins, a Catholic, had them baptized in the Catholic faith, and then declared them dependent, requesting the probate court to place them in an orphanage operated by the Catholic Charities until she was able to care for them herself. The plaintiffs, non-Catholics, filed this petition for adoption of the twins. The father of the twins consented, but the mother contested the petition. One of her defenses was a recent Illinois statute, hitherto uninterpreted by the Illinois courts.[1] The Catholic Charities of the Diocese of Rockford, Illinois, a charitable institution which had assisted the mother of the twins both before and after they were born, was allowed by the probate court to intervene as a party defendant over the plaintiffs' objection. The purpose of its intervention was twofold; first to aid the court in interpreting and applying the statute raised by the mother as a defense,[2] and secondly to assert its right to custody of the twins under another statute should the court deny the adoption.[3] The appellate court affirmed the trial court's holding, barring the adoption and allowing the intervention of the Charities.[4] The Supreme Court of Illinois, with two judges dissenting, remanded the case, *holding* that the statute relied upon by the defendant was not intended to bar absolutely adoption by those of different religious belief than the child, and that Charities had no "claim

1. Adoption Act §§ 4-2, ILL. ANN. STAT. c.4, §§ 4-2 (Smith-Hurd Supp.. 1956), which provides: "The court in entering a decree of adoption shall, whenever possible, give custody through adoption to a petitioner or petitioners of the same religious belief as that of the child."

2. The Charities, presenting the same argument as the mother, argued that the statute should be construed as a necessary prerequisite to entertaining a petition for adoption. They also introduced evidence that "it was possible" for these children to be adopted by a family of the same religious faith as the twins, because they had a list of Catholic families with sufficient funds and of good reputation seeking to adopt children. Cooper v. Hinrichs, 140 N.E.2d 293 (Ill. 1957).

3. CHILD PLACEMENT ACT § 2(a), ILL. ANN. STAT. c.23, § 299b1 (Smith-Hurd Supp. 1956), ". . . Whenever a child is placed in a child welfare agency such placement shall, when practicable, be to, with or in the custody of a child welfare agency under the control of persons of the same religious faith as that of the child." Of like tenor are Illinois' Juvenile Court Act § 17, ILL. ANN. STAT. c.23, § 211 (Smith-Hurd Supp. 1956); Public Assistance Code § 6-4, ILL. ANN. STAT. c.23, § 441-4 (Smith-Hurd Supp. 1956); and the Charities Act § 28, ILL. ANN. STAT. c.23, § 26 (Smith-Hurd Supp. 1956).

4. Cooper v. Hinrichs, 8 Ill. App. 2d 144, 130 N.E.2d 678 (1955).

or defense" within the purview of the Civil Practice Act § 26.1(2)(b), which provides:

> "Upon timely application anyone may in the discretion of the court be permitted to intervene in an action . . . when the applicant's claim or defense and the main action have a question of law or fact in common." [5]

Cooper v. Hinrichs, 140 N.E.2d 293 (Ill. 1957).[6]

Intervention under the permissive type statute is largely a matter within the trial judge's discretion.[7] In construing the federal permissive intervention statute,[8] the court in *S.E.C. v. United States Realty Improvement Co.* said, "This provision plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject matter of the litigation." [9] In another federal decision an applicant was denied permission to intervene because he had no "legal interest" in the litigation, but, because of the difficult questions involved, there was included in the order denying intervention leave to the applicant to participate in the trial, present argument, and file briefs as amicus curiae.[10] Where the rights of infants are involved, the courts have usually permitted strangers to intervene on their behalf as amici curiae,[11] even though they were already represented by a guardian.[12] Amici curiae have been permitted to argue the constitutionality of a "same religion" statute in adoption cases.[13] In adoption and custody proceedings, institutions which have had custody of a child sought to be adopted or taken have been permitted to join in the suit when the issue is in determining whose consent is necessary, even though they did not have custody at the time the proceedings were

5. ILL. ANN. STAT. c.110 § 150.1 (2) (b) (Smith-Hurd Supp. 1956). Incidentally, the trial court denied the petition because of the difference in religion. The Supreme Court reversed primarily on that ruling, and hence did not think it necessary to determine whether the error in allowing Charities to intervene was prejudicial.

6. Cooper v. Hinrichs, 140 N.E.2d 293 (Ill. 1957).

7. S.E.C. v. United States Realty Improvement Co., 310 U.S. 434 (1940); Hurley v. Finley, 6 Ill. App. 2d 23, 126 N.E.2d 513 (1955); Bachellor v. Docterman, 291 Ill. App. 418, 10 N.E.2d 42 (1937).

8. FED. R. CIV. P. 24 (b). The Illinois statute is patterned after this.

9. 310 U.S. 434, 459 (1940). In this case the S.E.C. was permitted to intervene in a bankruptcy proceeding since it was the agency charged with protecting the interests of the public. See Raoul Berger, *Intervention by Public Agency,* 50 YALE L.J. 65 (1940).

10. Jewell Ridge Coal Corp. v. Local 6167 United Mine Workers, CIO, 3 F.R.D. 251, 255 (W.D. Va. 1943) (The difficult questions involved portal to portal pay); Ladue v. Goodhead, 181 Misc. 807, 44 N.Y.S.2d 783 (Erie County Ct. 1943).

11. Jones v. Hudson, 93 Neb. 561, 141 N.W. 141 (1913); Steimer v. Steimer, 37 Misc. 26, 74 N.Y. Supp. 714 (Sup. Ct. 1902); Beard v. Travers, 1 Ves. 313, 27 Eng. Rep. 1052 (1749).

12. *In re* Guernsey, 21 Ill. 443 (1859); *In re* Green, 3 Brewst. 427 (Pa. 1869).

13. Petition of Goldman, 331 Mass. 647, 121 N.E. 2d 843 (1954), *cert denied,* 348 U.S. 942 (1952); Petition of Galley, 329 Mass. 143, 107 N.E.2d 21 (1952). The statute was found to be constitutional in the Goldman case. See Pfeffer, *Religion and the Upbringing of Children,* 35 B.U.L. REV. 333, 377 (1955).

commenced.[14] A welfare agency which takes in an abandoned child stands in loco parentis to the child.[15] In a Catholic mother's action to vacate a court order which declared her unfit and gave custody of her two children to a Jewish Home, the Catholic Charities was permitted to intervene as amicus curiae; the order was vacated and a rehearing ordered to which the Catholic Charities was to be given notice with leave to intervene on the question of proper disposition of custody of the children should the mother be found unfit.[16] Similarly, in a Catholic mother's suit to set aside a decree of adoption of her daughter in favor of non-Catholic defendants, and have her girl sent to a Catholic institution, the trial court took it upon itself to order the Catholic Charities to intervene. The defendants demurred, alleging, *inter alia,* that Charities is without "legal capacity" to bring or maintain the suit. The supreme court in affirming the overruling of the demurrer did not think it was necessary to enter into a discussion of this contention since the plaintiff and Charities sought substantially the same relief.[17]

The court in the instant case decided it was error to permit Charities to intervene because they had no "claim or defense" in the litigation. The dissent stated:

> " . . . that the recognized capacity of licensed agencies to render important assistance in these unusual cases makes inappropriate a literal application of the rules that govern intervention in other cases." [18]

This case involved a peculiar situation wherein the trial judge could have both denied the adoption on the grounds that the best interests of the children would not benefit by it, and also have refused to give custody to the mother because of her unfitness. Who then would get custody of the children? Charities asserted a statute which would require the court, when placing children in an agency to place them in one operated by persons of the same religious faith as the children.[19] While Catholic Charities has no legal right to require a Catholic child who has reached the age of reason to be placed in its custody if the child chooses otherwise, it would seem with regard to children who have not reached the age of reason and who are

14. *In re* McDonald's Adoption, 43 Cal.2d 447, 274 P.2d 860 (1954); Morrow v. Brashears, 265 Ky. 203, 96 S.W.2d 434 (1936); Petition of Sherman, 241 Minn. 447, 63 N.W.2d 573 (1954); State *ex rel* St. Louis Children's Aid Soc. v. Hughes, 352 Mo. 384, 177 S.W.2d 474 (1944); Lavigne v. Family & Children's Soc., 11 N.J. 473, 95 A.2d 6 (1953); *In re* Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dep't 1951), *appeal dismissed,* 304 N.Y. 483, 109 N.E.2d 71 (1952); *In re* Flora's Adoption, 152 Ore. 155, 52 P.2d 178 (1935); *In re* Dougherty's Adoption, 358 Pa. 620, 58 A.2d 77 (1948).

15. *In re* Korte, 78 Misc. 276, 139 N.Y. Supp. 444 (Kings County Ct. 1912).

16. *In re* Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dep't 1951), *appeal dismissed,* 304 N.Y. 483, 109 N.E.2d 71 (1952).

17. Palm v. Smith, 183 Ore. 617, 195 P.2d 708 (1948).

18. Cooper v. Hinrichs, 140 N.E.2d 293, 298 (Ill. 1957).

19. See note 3 *supra.* The trial court returned the twins to the orphanage operated by Charities. Brief for Appellants, p.8, Cooper v. Hinrichs, 8 Ill. App.2d 144, 130 N.E.2d 678 (1955).

members of a particular religion, that under the policy of the statute the authorized agency of that particular religion would have a right to endow the child with its teachings, and to protect the child's right not to be subjected to the teachings of other religions until he or she has reached the age of reason.[20]

Edward G. Mekel

20. Regarding placement in an institution operated by persons of the same religious faith, *In re* Santos, 278 App. Div. 373, 105 N.Y.S.2d 716, 718 (1st Dep't 1951) said: "To this the children have a natural and legal right of which they cannot be deprived by their temporary exposure to the culture of another religion prior to the age of reason".

CONDEMNATION—COOPERATION BY LANDLORD—BREACH OF COVENANT OF QUIET ENJOYMENT.

Dolman v. United States Trust Co. (N.Y. 1956).

After abortive negotiations with the city concerning the sale of land which was used as a parking lot, the defendant leased the property for five years to the plaintiff. The lease contained a covenant of quiet enjoyment and an express provision that in the event of condemnation the tenant would not be entitled to any portion of the condemnation award. With three years of the lease remaining, the defendant landlord entered into an amicable condemnation agreement as provided by the legislature,[1] and the City was given the option to purchase the landlord's award if his property was condemned. The property was condemned, and the plaintiff was evicted. The plaintiff alleged that the landlord wrongfully induced the City to condemn the property by giving the option, and that this was a breach of the covenant of quiet enjoyment. The Appellate Division of the Supreme Court affirmed[2] the Trial Term's holding[3] that the landlord had breached the covenant by voluntarily entering the condemnation agreement. The New York Court of Appeals reversed, and *held,* with two judges dissenting, that the covenant was not breached because the eviction was the result of the exercise of the sovereign power of condemnation and not the result of the option given by the landlord. *Dolman v. United States Trust Co.,* 2 N.Y.2d 110, 138 N.E.2d 784 (1956).[4]

The covenant of quiet enjoyment is an agreement on the part of the landlord that during the term of the lease he will do nothing to disturb the

1. The legislature had provided the *Consolidated Condemnation Procedure* by which the City of New York could enter an option agreement with the owner of land and agree to purchase for a sum specified in the option any award that the owner of the land would be entitled to on condemnation. N.Y.C. ADM. CODE § B15-30.0.

2. Dolman v. United States Trust Co., 1 App. Div. 2d 809, 148 N.Y.S.2d 809 (1st Dep't 1956).

3. Dolman v. United States Trust Co., 143 N.Y.S.2d 58 (Sup. Ct. 1955).

4. Dolman v. United States Trust Co., 2 N.Y.2d 110, 138 N.E.2d 784 (1956).

tenant in his peaceful enjoyment of the premises and also that the tenant shall not be disturbed by anyone with title superior to that of the landlord.[5] To constitute a breach of the covenant there must be an actual or constructive eviction [6] from the whole or from a substantial portion of the premises.[7] "[S]uch covenants go only to the lessor's title and do not warrant against those fundamental liabilities to action on the part of the sovereign power which lie behind all private titles." [8] Therefore, an interference by the exercise of the police power [9] or by eminent domain [10] is not a breach of the covenant. In *Goodyear Shoe Machinery Co. v. Boston Terminal Co.*[11] the defendant landlord, a railroad, condemned the premises, but the court ruled that this was not a breach of the covenant of quiet enjoyment since the landlord was exercising the delegated sovereign power. However, when the public authorities order the destruction of the premises because the landlord failed to perform his obligations there is a breach of the covenant. In *Kansas Inv. Co. v. Carter* [12] the lessor removed his building after receiving a notice from the building inspector either to make his building safe and secure or to remove it. The court stated that the right of election as to the mode of obeying the notice was limited by the covenant in the lease, and since the building was taken down when repairs could have made it safe and secure, the covenant was breached.

The plaintiff considered the suit as directed at the breach of the standard of conduct imposed on the landlord by the covenant rather than as a collateral attack on the condemnation proceedings. For policy reasons the courts have acquiesced in a gradual expansion of the scope of eminent domain during the current period of re-planning and slum clearance projects. The exercise of the power of condemnation in connection with privately organized and financed re-development companies has been ruled upon in New York and Illinois, and in both jurisdictions the courts have found the requisite "public use." [13] In *Berman v. Parker* [14] the Supreme Court of

5. Ganz v. Clark, 252 N.Y. 92, 169 N.E. 100 (1929); City of New York v. Unsafe Building & Structure, 194 Misc. 124, 86 N.Y.S.2d 113 (Sup. Ct. 1948); 1 RASCH, LANDLORD AND TENANT § 845 (1950).

6. Levy v. Cohen, 27 N.Y.S.2d 385 (City Ct. New Rochelle 1941).

7. Jackson v. Paterno, 58 Misc. 201, 108 N.Y.S. 1073 (Sup. Ct., App. T. 1908); Schuylkill and Dauphin Improvement and R.R. Co. v. Schmoele, 57 Pa. 271 (1868); Peter v. Grubb, 21 Pa. 455 (1853); 1 RASCH, LANDLORD AND TENANT §§ 849-50 (1950).

8. Goodyear Shoe Machinery Co. v. Boston Terminal Co., 176 Mass. 115, 117, 57 N.E. 214, 215 (1900).

9. Al's 334 9th Ave. Corp. v. Herbener, 275 App. Div. 904, 89 N.Y.S.2d 667 (1st Dep't 1949); Mellis v. Berman, 9 N.Y.S.2d 553 (Sup. Ct. App. T. 1938).

10. Weeks v. Grace, 194 Mass. 296, 80 N.E. 220 (1907); Goodyear Shoe Machinery Co. v. Boston Terminal Co., 176 Mass. 115, 57 N.E. 214 (1900); Kip v. N.Y. & H. R.R. Co., 67 N.Y. 227 (1876).

11. 176 Mass. 115, 57 N.E. 214 (1900). See also City of New York v. Unsafe Building & Structure, 194 Misc. 124, 86 N.Y.S.2d 113 (Sup. Ct. 1948).

12. 160 Mass. 421, 36 N.E. 63 (1894).

13. Zurn v. Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945); Murray v. La Guardia, 291 N.Y. 320, 52 N.E.2d 884 (1943). See Siegel, *Real Property Law And Mass Housing Needs*, 12 LAW & CONTEMP. PROB. 30 (1947).

14. 348 U.S. 26 (1954). See Lashly, *The Case of Berman v. Parker: Public Housing and Urban Redevelopment*, 41 A.B.A.J. 501 (1955).

the United States stated that the legislature could exercise the condemnation power to achieve aesthetic standards, *i.e.,* to see that the community was "beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled." [15] Because a large portion of the property in New York City is leased, many option agreements under the *Consolidated Condemnation Procedure* will be entered into with landlords, and to subject these landlords to possible suits for breach of the covenant of quiet enjoyment would place a stumbling block in the path of this consolidated procedure. As stated above, when the eviction was through the exercise of sovereign power delegated to the landlord there was no breach, but when the building was razed by or under the order of the sovereign because of the failure of the landlord to fulfill his lease obligations, there was a breach.[16] To avoid these stumbling blocks the court, in effect, has made the landlord an instrumentality in the exercise of the sovereign power, and as such immune from an action for breach of covenant because of condemnation of this sort. Though demanding, the policy reasons do not warrant what is seemingly judicial legislation.

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CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ADMISSIBILITY IN STATE CRIMINAL PROCEEDINGS OF EVIDENCE OBTAINED FROM PERSON OF ACCUSED.

Breithaupt v. Abrams (U.S. 1957).

Petitioner was involved in a collision with a passenger car while driving his pickup truck on a New Mexico highway. He was taken to a hospital where the odor of liquor was detected on his breath. While he was still unconscious, a physician, at the request of a state patrolman, withdrew about twenty cubic centimeters of blood from his body. The blood was tested, and its alcoholic content used in evidence against petitioner at his trial for involuntary manslaughter of which charge he was convicted. The Supreme Court of New Mexico denied petitioner a writ of habeas corpus. On certiorari, the Supreme Court of the United States, with three justices dissenting, also denied the writ, *holding* that the conduct of the state officer in directing the removal of blood did not offend a "sense of justice" so as to render the admission of evidence so obtained a violation of due process of law as defined by the fourteenth amendment. *Breithaupt v. Abrams,* 77 Sup. Ct. 408 (1957).[1]

15. Berman v. Parker, 348 U.S. 26, 33 (1954).
16. Lindwall v. May, 111 App. Div. 457, 97 N.Y.S. 821 (2nd Dep't 1906).

1. Breithaupt v. Abrams, 77 Sup. Ct. 408 (1957).

The states are free to regulate the procedures of their courts in accordance with their own conceptions of proper policy subject only to constitutional limitations safeguarding individuals from arbitrary state action.[2] The fourteenth amendment, through the due process clause[3] provides one yardstick for determining these limitations upon state criminal procedure. Thus, the confession of defendant in a state criminal action is inadmissible as evidence against him if it is not voluntarily given.[4] The reason usually advanced for the rule is that such confessions extracted by coercion, either physical[5] or psychological,[6] are intrinsically untrustworthy.[7] From the constitutional standpoint, the confession itself will not be admitted into evidence because to do so "offend[s] the community's sense of fair play and decency."[8] Although statements in a coerced confession may be independently established, a conviction based upon an involuntary confession will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict.[9] Since the Bill of Rights is not incorporated into the fourteenth amendment,[10] the sanction applied in the federal court system of not admitting evidence obtained through an unreasonable search and seizure[11] is not, in a state case necessary to the preservation of rights guaranteed by the fourth amendment.[12] It has been held, therefore, that evidence so obtained is admissible in state action since the admission of such evidence of itself does not violate due process.[13] Due process was not afforded an accused, however, where there was admitted at his trial evidence obtained through both an illegal entry and the application of brutal force upon his person.[14]

In the case of *Rochin v. California*[15] the authority upon which petitioner's argument was based in the instant case, the Court pointed out the

2. Brown v. Mississippi, 297 U.S. 278 (1936).

3. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

4. 3 WIGMORE, EVIDENCE §§ 822, 826 (3d ed. 1940).

5. Brown v. Mississippi, 297 U.S. 278 (1936).

6. Chambers v. Florida, 309 U.S. 227 (1940).

7. Wilson v. United States, 162 U.S. 613 (1896); 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

8. Rochin v. California, 342 U.S. 165, 174 (1952).

9. Malinski v. New York, 324 U.S. 401 (1945); Lyons v. Oklahoma, 322 U.S. 496 (1944). *But see* Stein v. New York, 346 U.S. 156 (1953).

10. Twining v. New Jersey, 211 U.S. 78 (1908).

11. Weeks v. United States, 232 U.S. 383 (1914).

12. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. CONST. amend. IV.

13. Wolf v. Colorado, 338 U.S. 25 (1949).

14. Rochin v. California, 342 U.S. 165 (1952). In this case police officers illegally entered the home of the defendant, forced open the door to his bedroom and seeing him swallow two capsules, unsuccessfully attempted to extract them. They then took him to a hospital where a doctor forced an emetic solution through a tube into defendant's stomach against his will. This produced vomiting from which matter were taken two capsules containing morphine. The capsules were used in evidence to convict the defendant. Conviction was reversed.

15. 342 U.S. 165 (1952).

analogy between the brutal extraction of evidence in that case and the extraction of evidence from the accused in the coerced confession cases.[16] It also relied upon the *whole* course of proceeding by which the conviction was obtained in arriving at its conclusion that due process of law had not been extended to the defendant.[17] In the instant case, the Supreme Court refused to apply the rule of the *Rochin* case since it found that there was no force present. This conclusion appears reasonable in light of the above and of the fact that dicta in the *Rochin* case indicates that the Court then foresaw possible extensions of the rule to such cases as this and intimated that it should not apply.[18] The Court did not discuss what effect there would have been upon its decision if the petitioner had resisted the police action as was done in the *Rochin* case, although it indicated that indiscriminate taking of blood might produce such brutality as would come under the *Rochin* rule. If the prisoner resisted the taking of blood in a state which allows it by law, it seems that the result would be the same as in the instant case since the police would have a right to use reasonable force to carry out the task. Should the police exercise "brutal" force, however, the *Rochin* rule might come to the prisoner's aid.

Burchard V. Martin

LABOR LAW—NLRA—EFFECT OF SECTION 8(D) ON THE RIGHT TO STRIKE—"QUICKIE STRIKE."

NLRB v. Lion Oil Co. (U.S. 1957).

A collective bargaining contract was to extend for one year to October 23, 1951, and thereafter unless cancelled. In addition, either party could terminate the contract sixty days after giving notice of desire to do so, provided (1) that the same party earlier had given notice of a desire to modify, and (2) no agreement was reached after sixty days of sincere negotiation. On August 24, 1951, the union notified respondent of its desire to modify. Negotiations during the sixty-day period following this notice failed. On April 30, 1952, a strike was called. No notice of a desire to cancel the contract had been given. Respondent offered to reinstate workers individually, but refused the union's offer to have the strikers return. Charged with an unfair labor practice under section 8(a) of the

16. 342 U.S. at 173.

17. 342 U.S. at 172.

18. "We therefore, put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrong-doers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record." 342 U.S. at 174.

National Labor Relations Act (NLRA), as amended,[1] respondent defended on the ground that since the strike occurred while the contract was still in effect, the strike was in violation of section 8(d),[2] the strikers had lost their employee status, and thus their protection under the NLRA. The NLRB found for the union, but the court of appeals set aside the order. The Supreme Court reversed, and *held* that the term "expiration" in section 8(d)(4) includes both termination and modification, and that the strike after the sixty-day waiting period and after the modification date but before termination of the contract did not violate section 8(d)(4). *NLRB v. Lion Oil Co.*, 77 Sup. Ct. 330 (1957).[3]

When a party to an existing collective bargaining contract wishes to terminate or modify it, section 8(d) requires him to give the other party written notice, and then both parties are to meet for negotiations and to continue to operate under the existing contract without strike or lockout during a "cooling off" period. All the terms of the contract must be continued ". . . for a period of sixty days after [notice of such desire] is given or until the *expiration* date of such contract, whichever occurs later. . . ." [4] (Emphasis added.) But what is meant by the term "expiration date"? Does it mean merely termination date (when the contract ends), or does it include also modification date (when by the terms of the contract certain of its provisions can be reopened)? The National Labor Relations Board, in the case of *Local 49, United Packinghouse Workers, CIO*,[5] determined that when a union observed a sixty-day waiting period before striking, the requirements of section 8(d) had been met even though the *termination* date had not yet occurred.[6] When the Board sought enforcement of its order in *Wilson & Co.*,[7] a case based on the same interpretation of section 8(d), the Eighth Circuit refused.[8] The court held that section 8(d) had been violated because the strike, though called after sixty days notice, occurred prior to the expiration date of the contract, without defining the term "expiration."[9] The instant case then came before the Board, which found that a strike after sixty days' notice and after the modification date, though prior to the termination date of the contract,

1. 61 STAT. 140 (1947), 29 U.S.C. § 158 (a) (1952).

2. 61 STAT. 142 (1947), 29 U.S.C. § 158 (d) (1952).

3. NLRB v. Lion Oil Co., 77 Sup. Ct. 330 (1957).

4. 61 STAT. 142 (1947), 29 U.S.C. § 158 (d) (4) (1952).

5. 89 N.L.R.B. 310 (1950).

6. The Board said the phrase "whichever occurs later" referred only to a situation in which notice of a desire to modify or terminate was given less than sixty days prior to the termination of the contract.

7. 105 N.L.R.B. 823 (1953).

8. Local 3, United Packinghouse Workers, CIO v. NLRB, 210 F.2d 325 (8th Cir. 1954).

9. The court apparently was referring to the termination date of August 11, 1948, and did not advert in its opinion to the fact that the terms of the contract provided for reopening on the issue of general wages once between August 11, 1947 and August 11, 1948. The strike occurred on March 16, 1948 after the union had requested reopening on the subject of a wage increase on December 19, 1947.

satisfied the requirements of section 8(d).[10] The Board said that it was adhering to the interpretation of the Eighth Circuit in that it was allowing the strike after sixty days' notice, and after the expiration date, but the Board defined "expiration date" as including modification date. On the Board's request for enforcement, the Eighth Circuit in effect rejected this meaning of the term "expiration date." [11]

Considering the two different meanings found by the National Labor Relations Board and the interpretation by the Eighth Circuit contrary to both, it can be seen there was need for a clarifying decision by the Supreme Court as to the effect of section 8(d) on bargaining strikes. The instant case gives a fixed meaning to the section and affirms the Board's interpretation below. Under a fixed-term contract with no provision for reopening, the expiration date is the actual termination date of the contract. A contract automatically renewable demands notice sixty days prior to such renewal time, and a contract of indefinite duration (rare in labor relations) requires just a sixty-day notice period at any time modification or termination is *sought*. The Supreme Court's analysis of the ambiguous language and legislative history of section 8(d) is at least as convincing as that of the Board in its earlier decisions [12] and that of the Eighth Circuit.[13] The result has the additional merit of encouraging both unions and management to live up to their contracts. If the contract allows modification during its term, then the union can exercise its strike weapon, after having given sixty days' notice. On the other hand, the union in effect agrees to a no-strike clause for the duration of the contract if it does not exact from management a modification provision. The encouraging trend toward long-term contracts will not be hampered by the instant decision, but modification clauses undoubtedly will be more often used.

William J. Goebelbecker

LABOR LAW—NLRA—No State Jurisdiction Where NLRB Refuses to Exercise Statutory Jurisdiction.

Guss v. Utah Labor Relations Board (U.S. 1957).

Appellant, doing business in Salt Lake City, Utah, manufactured photographic equipment for the Air Force on a contract basis. He purchased materials outside Utah in an amount of approximately $50,000.

10. Lion Oil Co. and Oil Workers Int'l Union, CIO, 109 N.L.R.B. 680 (1954). For a discussion of the subject up to this stage see 64 YALE L.J. 248 (1954).

11. Lion Oil Co. v. NLRB, 221 F.2d 231 (8th Cir. 1955).

12. Wilson & Co., 105 N.L.R.B. 823 (1953); Local 49, United Packinghouse Workers, CIO, 89 N.L.R.B. 310 (1950). These decisions don't adequately explain the words "whichever occurs later" in § 8 (d) (4).

13. Lion Oil Co. v. NLRB, 221 F.2d 231 (8th Cir. 1955); Local 3, United Packinghouse Workers, CIO v. NLRB, 210 F.2d 325 (8th Cir. 1954). Under § 8 (d) the parties have a duty to bargain collectively when their contract provides for modification, but the weapons of strike and lock-out, essential to effective bargaining, are proscribed under these decisions.

Finished products were shipped to Air Force bases, one within Utah, and the others outside the state. In 1953, the United Steelworkers of America was certified by the National Labor Relations Board as bargaining representative of appellant's employees. Shortly thereafter the union filed charges with the Board that the appellant had engaged in certain unfair labor practices. The Board's acting regional director declined to issue a complaint, stating, as noted in the instant case, that ". . . the operations of the Company involved are predominantly local in character, and it does not appear that it would effectuate the policies of the Act to exercise jurisdiction." The union thereupon filed substantially the same charges with the Utah Labor Relations Board. The state Board found it had jurisdiction, and concluded on the merits that appellant had engaged in unfair labor practices, and granted relief through a remedial order. The Utah Supreme Court affirmed the decision and order. The United States Supreme Court, in an opinion written by Chief Justice Warren, reversed with two justices dissenting. The Court *held* that the section of the National Labor Relations Act,[1] empowering the National Labor Relations Board to cede to a state agency its jurisdiction over unfair labor practices affecting commerce is the exclusive means whereby states may be enabled to act concerning matters which Congress has entrusted to the National Labor Relations Board. Therefore, the Utah Board had no power to deal with unfair labor practice charges within the jurisdiction of the national Board where the national Board declined to exercise its jurisdiction but had not ceded jurisdiction to the Utah Board. *Guss v. Utah Labor Relations Board,* 77 Sup. Ct. 598 (1957).[2]

The constitutionality of the original National Labor Relations Act, the Wagner Act,[3] was first tested in *Jones and Laughlin Steel Corp. v. NLRB,*[4] and passed the test unscathed. Often the question arose whether state labor relations boards had any jurisdiction over unfair labor practices which affected interstate commerce.[5] The phrase "affecting interstate com-

1. 61 Stat. 146 (1947), 29 U.S.C. § 160 (a) (1952). The section provides: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any case in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provisions of this subchapter or has received a construction inconsistent therewith."

2. Guss v. Utah Labor Relations Board, 77 Sup. Ct. 598 (1957).

3. c.372, 49 Stat. 449 (1935).

4. 301 U.S. 1 (1937).

5. Cases holding that the state has no jurisdiction include Garner v. Teamsters Union, AFL, 346 U.S. 485 (1953); Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947); Retail Clerks Local 1564 v. Your Food Stores, 225 F.2d 659 (10th Cir. 1955) (dictum); Pocahontas Terminal Corp v. Portland Bldg. Council, 93 F. Supp. 217 (D.C. Me. 1950); Gerry of California v. Superior Court, 32 Cal. 2d 119, 194 P.2d 689 (1948). *But see* Algoma Plywood and Veneer Co.

merce" has been construed very broadly,[6] with the result that there are very few fields wherein the states can exercise jurisdiction.[7] Before the decision in the instant case, the courts were divided as to the question of state jurisdiction where the national Board declined to exercise jurisdiction.[8] The national Board, prior to 1950, decided whether or not to take jurisdiction on a case-by-case basis.[9] In 1950, the Board announced certain standards based on dollar amount to govern the exercise of its jurisdiction.[10] In 1954, these standards were revised sharply upwards,[11] resulting in a sizable increase in the "no-man's-land" wherein state jurisdiction was uncertain.[12] The instant case has indicated that Congress intended the federal act to occupy the field, pre-empting states in matters affecting interstate commerce. The broad coverage of "affecting interstate commerce," [13] plus the restricted application of the *"de-minimis"* doctrine,[14] practically forecloses any possibility of state action in the labor field under present law.[15] However, in the instant case, the Court has explicitly left open two important questions, namely, whether the National Labor Relations Board can refuse to assume jurisdiction in any particular case, and if so, whether the Board can set up jurisdictional yardsticks to govern its assertion of jurisdiction.[16]

Assuming that the National Labor Relations Board can set up jurisdictional yardsticks, the decision in the instant case has left a wide "no-man's-

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v. Wisconsin Employment Relations Board, 336 U.S. 301, 313 (1949), where the Court stated, "Where state and federal laws do not overlap no cession is necessary because the state's jurisdiction is unimpaired. This reading is confirmed by the purpose of the proviso in which the phrase is contained: To meet situations made possible by Bethlehem v. New York State Labor Relations Board, where no state agency would be free to take jurisdiction of cases over which the National Board has declined jurisdiction." See also International Union v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949).

6. Wickard v. Filburn, 317 U.S. 111 (1942).

7. "To be sure, whether we like it or not, there is not much left of the doctrine of states' rights as such where commerce is concerned." Lorenz, *The Conflict of Jurisdiction,* 2 LAB. L.J. 887, 891 (1951).

8. See note 5 *supra.*

9. Guss v. Utah Labor Relations Board, 77 Sup. Ct. 598, 599 (1957).

10. See NLRB Jurisdictional Yardsticks, CCH LAB. L. REP. (4th ed.) ¶ 1610.

11. *Ibid.*

12. See Guss v. Utah Labor Relations Board, 77 Sup. Ct. 598 n. 9 (1957).

13. See notes 9 and 10 *supra.*

14. See, e.g., NLRB v. Green, Inc., 125 F.2d 485 (4th Cir. 1942) (less than 1% of business interstate held to affect commerce); NLRB v. Schmidt Baking Co., Inc., 122 F.2d 162 (4th Cir. 1941) (less than .001% of business interstate held to affect commerce).

15. See Guss v. Utah Labor Relations Board, 77 Sup. Ct. 598, 603 n. 17 (1957); "The National Labor Relations Board has informed us in its brief *amicus curiae* in these cases that it has been unable, because of the conditions prescribed by the proviso to § 10 (a), to consumate any cession agreements."

16. The Supreme Court, in dicta, and the lower federal courts, by direct holding, have upheld the Board's discretion in the matter of jurisdiction and jurisdictional yardsticks. See, *e.g.,* NLRB v. Denver Bldg. Trades Council, 341 U.S. 675, 684 (1951) (dictum); NLRB v. Herald Publishing Co., 239 F.2d 410 (9th Cir. 1956); NLRB v. Swinerton and Walberg Co., 202 F.2d 511 (9th Cir. 1953); Local 12, Progressive Mine Workers v. NLRB, 189 F.2d 1 (7th Cir. 1951); Haleston Drug Stores, Inc. v. NLRB, 187 F.2d 418 (9th Cir. 1951). *Compare* Pedersen v. NLRB, 234 F.2d 417 (2d Cir. 1956); Joliet Contractors Ass'n v. NLRB, 193 F.2d 833 (7th Cir. 1952).

land" of labor relations wherein the national Board will not act, and the states cannot act. The Court has settled the question of state jurisdiction adversely to the states. It was not necessary for the Court to do so, and perhaps it would have been better to adopt the dissenting opinions, which would have permitted state jurisdiction in this type of situation. However, by its decision, the Court probably will force Congress to act. Legislation has already been introduced to remedy the situation.[17] It seems that Congress may decide once and for all whether its policy is to permit state action in the field of labor relations, or to limit jurisdiction over labor relations affecting commerce to the federal government. It does not seem probable that Congress will fail to make a decision since the legal vacuum involved is by no means of minor consequence, but covers a large segment of the field of labor relations.

Thomas F. Burns

PROBATE PRACTICE—TENTATIVE TRUST DEPOSIT—ALLOWANCE OF TAXES, DEBTS, AND EXPENSES ON DEPOSITOR'S DEATH.

Estate of Currier (O.C. Pa. 1957).

George Adams opened an account with a federal savings and loan association in the name of George Adams, in trust for Robert Bruce Currier, a grandnephew. He deposited in it, from time to time, funds derived from a pension received by virtue of service in World War I. When Adams died, he had no other assets except some social security payments which were applied to his funeral bill, leaving a debt balance of $680. A guardian was appointed for the grandnephew, a minor, and the guardian petitioned the orphans' court to allow payment out of the trust deposit of the expense of his appointment, the Pennsylvania inheritance tax, and the balance due on the funeral bill. The court entertained testimony of the minor's mother that Adams had intended the account be subject to the payment of his debts and funeral expenses, and allowed the payments requested, *Estate of Currier*.[1]

When a person deposited money in a bank in his own name to be held in trust for another, some courts originally held that an irrevocable trust was presumed to be created,[2] while others maintained that there could be no trust created merely from such a form of deposit.[3] The New York

17. *E.g.*, S. 1772, 85th Cong., 1st Sess. (1957).

1. Estate of Currier, 136 LEGAL INTELLIGENCER No. 28, p. 1, col. 3 (O. C., Mont. Jan. 14, 1957).

2. Rose v. Osborne, 133 Me. 497, 180 Atl. 315 (1935); Martin v. Funk, 75 N.Y. 135 (1878); Estate of Gaffney, 146 Pa. 49, 23 Atl. 163 (1892).

3. Sherman v. Bank, 138 Mass. 581 (1885); Northup v. Hale, 73 Me. 66 (1881); Marcy v. Amazeen, 61 N.H. 131 (1881); Beaver v. Beaver, 117 N.Y. 421, 22 N.E. 940 (1889).

court in *Matter of Totten*[4] declared that such an act created a tentative trust, revocable at will, until the depositor died or completed the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. This doctrine has been adopted by many states, including Pennsylvania.[5] The tentative trust is a revocable trust, and it will be revoked by the depositors withdrawing the trust deposit.[6] It is also revoked by the beneficiary's predeceasing the depositor,[7] or by the depositor's express disposition of the deposit in his will in favor of a person other than the beneficiary.[8] There is a dispute as to whether the tentative trust is initiated at the time of the deposit and is subject to the condition subsequent of revocation,[9] or whether the depositor's death is a condition precedent to its creation and until then the beneficiary's interest is inchoate.[10] The courts have not been consistent in basing their decisions on any one theory. For example, where a question of avoidance of the formal requirements of the Statute of Wills was raised, it was held to be an inter vivos trust to which the statute did not apply.[11] But, where there was a question of the rights of the widow of a deceased depositor, the tentative trust was considered sufficiently testamentary in nature to allow his widow to reach the deposit in order to receive her share of the estate under intestacy statutes.[12] The same reasoning is applied to make the deposit subject to state transfer inheritance taxes.[13] As to the rights of the cred-

4. 117 N.Y. 421, 22 N.E. 940 (1889). However, it has been held that the intention to create an irrevocable trust must be clear and unequivocal and notice to the beneficiary, per se, will not prove that intention. *In re* Ingels Estate, 372 Pa. 171, 92 A.2d 881 (1952).

5. Scanlon's Estate, 313 Pa. 424, 169 Atl. 106 (1933); Brucks v. Home Federal Sav. & Loan Ass'n., 36 Cal.2d 845, 228 P.2d 545 (1951); Cressy v. Fisher, 16 Conn. Supp. 391 (C.P. 1949); Delaware Trust Co. v. Fitzmaurice, 27 Del. Ch. 101, 31 A.2d 383 (Ch. 1943); Wilder v. Howard, 188 Ga. 426, 4 S.E.2d 199 (1939); Hale v. Hale, 313 Ky. 344, 231 S.W.2d 2 (1950); Littig v. Mt. Calvary Church, 101 Md. 494, 61 Atl. 635 (1905); Walso v. Latterner, 140 Minn. 455, 168 N.W. 353 (1818). However, it has been held that since the disposition of the deposit is not complete until the depositor dies, it is therefore testamentary and void as not conforming to the Statute of Wills. Reynolds v. Reynolds, 325 Mass. 257, 90 N.E.2d 338 (1950).

6. *In re* Kiley's Estate, 197 Misc. 34, 94 N.Y.S.2d 64 (Surr. Ct. 1949). Where the depositor withdraws a part of the deposit, there is a revocation of the trust pro tanto. *In re* Slobiansky's Estate, 152 Misc. 232, 273 N.Y. Supp. 869 (Surr. Ct. 1934).

7. Hyman v. Tarplee, 64 Cal. App. 2d 805, 149 P.2d 453 (1944).

8. *In re* Brennan's Estate, 59 N.Y.S.2d 182 (Surr. Ct. 1946). However, a disposition made in the will of the residue of the depositor's estate will not revoke the tentative trust. Meehan v. Emigrant Industrial Savings Bank, 213 App. Div. 807, 208 N.Y. Supp. 325 (Sup. Ct. 1925).

9. Scott, *Trusts and the Statute of Wills,* 43 HARV. L. REV. 521 (1930).

10. Bogert, *The Creation of Trusts by Means of Bank Deposits,* 1 CORNELL L.Q. 159 (1916).

11. Kosloskye v. Cis, 70 Cal. App. 2d 174, 160 P.2d 565 (1945); *In re* Loeffler's Estate, 97 N.Y.S. 2d 450 (Surr. Ct. 1950); *In re* Ingels Estate, 372 Pa. 171, 92 A.2d 881 (1952). Pennsylvania, as well as other states, has a statutory provision whereby the bank can pay over the deposit to the beneficiary on the death of the trustee without being liable to the decedent's estate. PA. STAT. ANN. tit. 7, §§ 819-904 (Supp. 1956).

12. Murray v. Brooklyn Sav. Bank, 169 Misc. 1014, 9 N.Y.S.2d 227 (Sup. Ct. 1939); Black Estate, 73 Pa. D & C 86 (O.C. Del. 1950).

13. *In re* Barber's Estate, 114 N.Y. Supp. 725 (Surr. Ct. 1908); PA. STAT. ANN. tit. 72, § 2301 (Supp. 1956).

itors of the deceased depositor, it is again sufficiently testamentary in character that they can reach the deposit.[14]

Since this is the first time the question has arisen in Pennsylvania, it is significant that the court has followed the New York view[15] that the tentative trust deposit is chargeable with the funeral expenses of the deceased depositor.[16] The tentative trust, often called "the poor man's will", has long been a species of legal chameleon, for some purposes regarded as a conveyance inter vivos, and for other purposes regarded as testamentary in character. The present decision proceeds upon both theories, failing to observe the inconsistency. In allowing the debts, inheritance tax and expenses, the court has treated it as testamentary in character. However, in allowing oral declaration of the depositor's intent that it be used for his funeral expenses, it acted upon the theory that it was an inter vivos trust, thus ignoring the fact that under the Statute of Wills such intent would have to be evidenced in writing. Also, in awarding guardianship expenses, the court failed to recognize the procedural distinction between the administration of a decedent's estate and a guardian's accounting, since ordinarily a guardian is not entitled to his expenses until he has made an accounting.

Francis P. Connors

TORTS—LIBEL AND SLANDER—TELEVISION BROADCAST WITHOUT A SCRIPT

Shor v. Billingsley, 158 N.Y.S.2d 476 (Sup. Ct. 1957).

The plaintiff, a New York restaurateur, brought an action for defamation and invasion of privacy against the defendant, a competing restaurateur, and others. The defendant, Billingsley, held a picture before the camera on a television show of which he was the master of ceremonies, and, in the course of conversation with a guest on the show, identified the picture as one of the plaintiff, saying, "I wish I had as much money as he owes." On the defendant's motion to dismiss, the Supreme Court, Special Term, *held, inter alia,*[1] in a case of first impression that defamation

14. *In re* Weinberg's Estate, 162 Misc. 867, 296 N.Y. Supp. 7 (Surr. Ct. 1937). The creditors of the depositor can also reach the trust deposit while the depositor is living. *In re* Wandle, 62 N.Y.S.2d 292 (Sup. Ct. 1944); Banca D'Italia v. Giordano, 154 Pa. Super 452, 36 A.2d 242 (1941).

15. *In re* Aybar's Estate, 203 Misc. 372, 116 N.Y.S.2d 720 (Surr. Ct. 1952).

16. It remains to be seen whether the same result will be reached if the decedent has not evidenced a clear intent to have the trust deposit charged with his funeral expenses.

1. There were two other counts in libel which were held sufficient since they alleged that words were; (a) contained in a script, and (b) permanently recorded. The count for an invasion of privacy was first dismissed on the ground that it merged in the defamation counts, but was reinstated on reargument on the ground that merger might prejudice the plaintiff since it might develop, at trial, that he would be unable to prove the defamation counts and hence, because of the merger, have no opportunity to prove the cause of action for an invasion of privacy. Shor v. Billingsley, 158 N.Y.S.2d 476 (Sup. Ct. 1957).

by means of radio or television without a script properly sounds in libel because of the vast area of dissemination. *Shor v. Billingsley,* 158 N.Y.S. 2d 476 (Sup. Ct. 1957).[2]

The modern American law of libel and slander is based on the decision in *Thorley v. Lord Kerry,*[3] wherein it was held that a letter charging the plaintiff with dishonorable conduct is actionable, although if the offending words are merely spoken, no action lies. The distinction there recognized may be more fully stated as follows: in an action for libel, *i.e.,* written defamation,[4] the existence of damages is said to be presumed and need not be proved, whereas in an action for slander, *i.e.,* oral defamation,[5] damages must be pleaded and proved (unless the words fall into one of three, or possibly four, categories called slander per se).[6] The word "written" as used in the definition of libel includes defamation "in any form of a more or less permanent nature" [7] such as pictures or hieroglyphics as well as printed words.[8] It was early decided that defamation by motion picture is libel.[9] But the radio and television cases have caused much confusion. The general rule seems to be that the reading of words from a script over either medium constitutes libel, but if no script is used, the offense is slander.[10] The court in the instant case was faced with the decision of *Locke v. Gibbons* wherein a complaint based on interpolations made by the defendant in a radio broadcast was dismissed as sounding in slander rather than libel.[11] The court there reasoned that a radio broadcast was analogous to the delivery of a speech over an amplifier to a vast audience in a stadium, which would be slander. But an alternate ground of decision was that the words complained of were not set forth in the complaint. Since the case was affirmed on appeal without an opinion but with the notation to see

2. Shor v. Billingsley, 158 N.Y.S.2d 476 (Sup. Ct. 1957).

3. 4 Taunt. 355, 128 Eng. Rep. 367 (C.A. 1812).

4. "From the fact of the publication of the defamatory matter by the defendant, damage to the plaintiff is said to be 'presumed,' and the jury, without any further data, is at liberty to assess substantial damages, upon the assumption that the plaintiff's reputation has been injured and his feelings wounded." MCCORMICK, DAMAGES § 116 (1935).

5. RESTATEMENT, TORTS § 568(2) (1938).

6. The categories are; where the words charge the plaintiff with (a) a crime, (b) a loathsome disease, (c) characteristics imcompatible with the proper exercise of his business, and, in some jurisdictions, (d) a lack of chastity in a woman.

7. GATLEY, LIBEL AND SLANDER 18 (4th ed. 1953).

8. See Ostrowe v. Lee, 256 N.Y. 36, 175 N.E. 505, 506 (1931).

9. Brown v. Paramount-Publix Corp., 240 App. Div. 520, 270 N.Y.Supp. 544 (3d Dep't 1934).

10. Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947). *Contra,* Meldrum v. Australian Broadcasting Co., [1932] Vict. L. R. 425 (Austr.), cited and discussed in 7 AUSTR. L. J. 257 (1933). This distinction may well be justified when the defendant is someone other than the speaker, since, although the injury will be as great when the words are interpolated, there is a difference in culpability because the station, sponsor, etc. cannot guard against interpolations as well.

11. 164 Misc. 877, 299 N.Y.Supp. 188 (Sup. Ct. 1937), *aff'd* 253 App. Div. 887, 2 N.Y.S.2d 1015 (1st Dep't 1938).

another case [12] which was decided on what was the alternate ground in the *Gibbons* case, the court in the instant case found that the *Gibbons* decision was not controlling. In *Hartmann v. Winchell* [13] the court expressly left the question undecided, although Justice Fuld, concurring, opined that libel was the proper form of action.[14] The court in the instant case distinguishes the language of Justice Cardozo in *Ostrowe v. Lee*.[15] There the defendant dictated a letter to his secretary and directed the secretary to read it. The letter defamed the plaintiff who thereafter sued for libel. The defense that slander was the proper form of action was rejected by Cardozo, who said:

> "Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmitted into print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and perpetuates the scandal." [16]

The court interprets these words as an extension of an older rule that where a compositor in a printing house or a telegrapher reads defamatory material, libel is the proper action. To support the proposition that Cardozo "was the first to recognize the duty of the courts to extend an established principle of law to a new technological development" [17] the court cites *MacPherson v. Buick Motor Co.*[18] Finally, in answer to the defendant's argument that the change sought here can be properly made only by the legislature, the court quotes from *Wood v. Lancet:* "Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." [19] The court asserts that its holding is a modification of an existing rule rather than the creation of a new one.

It would seem that the distinction between libel and slander was valid when created, and remained so until travel came to be common, on the theory that mere oral defamation did not usually cause any damage in the vast majority of cases. This was so because oral defamation was more or less a "neighborhood" affair in which those to whom it was published were

12. Locke v. Benton & Bowles, Inc., 253 App. Div. 369, 2 N.Y.S.2d 150 (1st Dep't 1938) (action for libel based on interpolations made on radio show), The notation appears only in 253 App. Div. 369.

13. 296 N.Y. 296, 73 N.E.2d 30 (1947). (action for libel based on words read from a script over radio).

14. Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30, 34 (1947) (concurring opinion).

15. 256 N.Y. 36, 175 N.E. 505 (1931).

16. Ostrowe v. Lee, 256 N.Y. 36, 39, 175 N.E. 505, 506 (1931).

17. Shor v. Billingsley, 158 N.Y.S.2d 476, 484 (Sup. Ct. 1957).

18. 217 N.Y. 382, 111 N.E. 1050 (1916) (action for negligence against the manufacturer of an automobile bought by the plaintiff from a retail dealer.)

19. 303 N.Y. 349, 355-356, 102 N.E.2d 691, 694 (1951) (action for injuries sustained while plaintiff was *en ventre sa mere* in the ninth month of his mother's pregnancy).

conversant to a marked degree with the character of the one defamed and with the specific dispute or incident which instigated the defamation. Thus, if actual damage was the exception rather than the rule, there was no need for a presumption of damages. On the other hand, written defamation would be circulated beyond the "neighborhood"—or at least such circulation was inherently probable by virtue of the permanency of a writing—and thus a presumption of damages was reasonable. When travel came to be commonplace, the distinction probably lost much of its validity, because then even slander would be published beyond the confines of the "neighborhood." And with the advent of modern mass communication, all validity was lost. The principal reason advanced today by the courts to support the distinction is that the probability of harm is greatly increased when the defamation is permanently recorded.[20] But the harm caused by radio or television defamation comes from hearing the defamatory words and not from reading them. In fact, the listener ordinarily does not know whether there is or is not a script involved. It seems safe to say that the probability of harm from defamation by radio or television today with or without a script is so great as to make eminently reasonable a presumption of damages. Another reason given for the distinction is that to write defamation necessitates a greater degree of malice than mere speech.[21] This is probably not as true of a radio or television broadcast as it is of mere impromptu conversation, since a radio or television broadcast is prepared beforehand. But, to the extent that it is true, it is irrelevant. The injured party is concerned with the damage he has suffered, not the mental state of the one who caused this damage. The degree of malice present should be a factor in the computation of punitive damages, but has no place in the civil remedy which exists solely to make whole the one defamed. Thus, it seems much more realistic to hold, as does the court in the instant case, that it is so probable that defamation by radio or television causes harm that damages should be presumed. Since the courts created the distinction, it would seem that the courts may abolish it. (Although the court herein is of the opinion that its decision is a modification of existing law, and not a real change, it would seem that this is a real change since the complaint states a cause of action always before held to be slander.) Blackstone admitted that a judge in the common law system may rightly refuse to follow a precedent which is absurd, contrary to reason, or plainly inconvenient.[22] Much the same idea was expressed by Justice Sutherland in *Funk v. United States*.[23] The court in the instant case found that

20. Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947) (concurring opinion).

21. GATLEY, LIBEL AND SLANDER 4-5 (4th ed. 1953).

22. 1 BLACKSTONE, COMMENTARIES *69-70.

23. 290 U.S. 371 (1933) (prosecution for conspiracy in which defendant appealed a ruling that his wife was not a competent witness in his behalf). See Kettelsen v. Stilz, 184 Ind. 702, 111 N.E. 423 (1916) (Action against one joint tortfeasor after execution on a judgment against the other joint tortfeasor had been returned *nulla bona*).

Ostrowe v. Lee[24] did not control. Although at least one other court would disagree, on the ground that there is no "permanence of form" in a radio or television program broadcast without a script,[25] it would seem that the New York court is correct, for Cardozo's oft-quoted words do not refer to a fact-setting comparable to that in the instant case. This then is a case of first impression in New York, and for the reasons stated, seems to have been correctly decided.[26]

Joseph M. Smith

24. 256 N.Y. 36, 175 N.E. 505 (1931).
25. Remington v. Bentley, 88 F. Supp. 166 (S.D.N.Y. 1949).
26. England has achieved this result by statute. Defamation Act, 1952, 15 & 16 GEO. 6, 1 ELIZ. 2, c. 66.